

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK D. ASTON

Claimant

VS.

CESSNA AIRCRAFT COMPANY

Self-Insured Respondent

Docket No. 1,012,531

ORDER

Respondent requested review of the December 2, 2004 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on May 17, 2005.

APPEARANCES

Dale V. Slape, of Wichita, Kansas, appeared for the claimant. Vince A. Burnett, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that claimant's last date of work was August 26, 2003, and not August 25th, as indicated in the ALJ's Award.

ISSUES

The ALJ found that claimant met with personal injury out of and in the course of employment with respondent in a series of accidental injuries culminating on August 26, 2003.¹ Accordingly, the ALJ awarded claimant a 62 percent work disability (permanent partial general bodily disability) under K.S.A. 44-510e(a) based on a 24 percent task loss (which is an average of the opinions offered by Drs. Murati and Estivo) and a 100 percent

¹ There was some confusion in the record as to claimant's last date of work. The parties ultimately agreed August 26, 2003 was claimant's last date worked (rather than August 25, 2003) and as a result, the parties agreed the date of accident must be modified.

wage loss. The ALJ specifically found that claimant “demonstrated that he made a good faith effort to find work”.² Thus, she computed claimant’s work disability based upon his actual wage loss rather than imputing a wage.

The respondent requests review of the ALJ’s decision. Respondent asserts that claimant failed to meet his evidentiary burden of establishing that he suffered personal injury arising out of and in the course of his employment with respondent on the date alleged. Respondent alternatively asserts that Dr. Estivo has testified that claimant requires no permanent work restrictions as a result of this accident, and therefore has no task loss attributable to this claim. Accordingly, respondent argues that claimant is not entitled to a work disability.

Respondent further asserts that claimant’s current attempt to obtain worker compensation benefits for alleged upper extremity and cervical complaints is simply the result of his dissatisfaction and rancor at being told that his restrictions resulting from his earlier 1994 low back injury could no longer be accommodated.³ Respondent views this claim along with claimant’s union grievance as a act of retaliation by claimant for its decision to discontinue his active employment in August 26, 2003.

Alternatively, in the event claimant is granted a permanent partial general body disability under K.S.A. 44-510e(a) (work disability), respondent alleges claimant failed to make a good faith effort to find appropriate employment since leaving it’s employ as required by Kansas case law. Based upon the testimony of respondent’s vocational expert, claimant is capable of earning a comparable wage no less than 91 percent of his pre-injury wage. Thus, claimant is ineligible for work disability benefits.

Claimant argues that all of the evidence is consistent with his claim that he suffered permanent injury to his cervical spine and upper extremities from repetitive work duties. He maintains he has suffered a 49 percent task loss and a 100 percent wage loss, despite his efforts to find appropriate employment within his restrictions. Thus, claimant requests that the ALJ’s decision be affirmed in all respects.

The issues to be resolved by this appeal are as follows:

1. Whether claimant met with personal injury arising out of and in the course of his employment; and
2. The nature and extent of claimant’s impairment, including work disability under K.S.A. 44-510e(a).

² ALJ Award (Dec. 2, 2004) at 4.

³ Respondent's Brief at 9 (filed Jan. 21, 2005).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is a 43 year old individual who has worked as a machinist for respondent since 1990. He was most recently assigned to a machinist/CNC lathe operator position. This job involved the repetitive use of wrenches, deburring equipment and stooping into the machines.

In 1994 claimant suffered a series of low back injuries culminating in an accident on October 19, 1994. He was treated by several doctors and assigned permanent restrictions, which included a 35 pound lifting restriction, along with standing, sitting and walking limitations. Although claimant was given restrictions, respondent was able to take claimant back to work in September 1995. According to claimant, he ultimately returned to work at his former position in the computer lathe lab (in May 1996) and he would do what he needed to do to get the job done.⁴

Claimant worked in the CNC/lathe operator position from May of 1996 to May of 2002. At that point, he was promoted to a crew chief position, which he held until August 26, 2003. As crew chief, claimant testified he would spend some time scheduling the workers shifts, but for the most part, the job was identical to that of the CNC/lathe operator position. In other words, it was a working crew chief position.

Claimant began noticing problems with his neck, hands, fingers and wrists in August of 2002. The more claimant worked the more his symptoms were aggravated.⁵ Claimant testified that he had been having problems for over a year, but he did not want to mention anything to his employer. He further testified that his neck and upper extremity symptoms compelled him to take the crew chief position as it involved slightly less work with the machines. Nonetheless, he turned down overtime assignments as he noticed that the increased hours aggravated his bilateral hand symptoms. Claimant testified he tried to alter his work methods, but that nothing seemed to help, and that he did not want to say anything for fear of being "laid off".⁶

In August of 2003, claimant was told he needed to have a functional capacities evaluation in connection with his 1994 low back workers compensation injury. He tried to refuse the evaluation as he was concerned that he might lose his job. Apparently other

⁴ R. H. Trans. at 24.

⁵ *Id.* at 9.

⁶ Murati Depo., Ex. 2 at 1.

employees who were called in for this process were then “out the door.”⁷ Nonetheless, respondent compelled claimant to complete the process. Shortly thereafter, claimant was advised that respondent could no longer accommodate his low back restrictions.⁸ Claimant was placed on leave of absence and escorted off the respondent’s property on August 26, 2003, and he has not worked anywhere else since that date.

Claimant has been actively looking for employment since he left respondent’s employ. His list of contacts reflects an average of 5 contacts per week.⁹ Claimant indicated that his original focus had been on finding another machinist job and that recently he has decided to expand his search as he has been unsuccessful at finding a machinist position.¹⁰ He presently experiences pain and stiffness in his neck. Claimant testified that when he uses his arms frequently he has problems with numbness in his fingers, with the left being worse than the right.¹¹ He also has difficulty gripping with his hands.

On August 28, 2003, shortly after being put on leave of absence, claimant notified respondent that he was having problems with his upper extremities and neck. Claimant admits this is was first notice to respondent of his upper extremity and neck complaints. He requested respondent provide treatment and respondent referred claimant to Dr. John P. Estivo.

Dr. Estivo first saw claimant on October 1, 2003. At this time claimant was complaining of some cervical spine stiffness and pain as well as numbness and tingling in both hands.¹² After an examination, Dr. Estivo diagnosed claimant with cervical spine strain and possible carpal tunnel with bilateral wrist strain. He recommended claimant have a nerve conduction test and an EMG to further evaluate the neck and hand numbness. Claimant was released to light duty restrictions of no repetitive use of both hands and no overhead work.

Dr. Estivo again saw claimant on October 8, 2003 for a follow-up visit. He studied the results of the additional tests he ordered, which showed very mild ulnar nerve latencies at the wrists. Carpal tunnel was not revealed. He also conducted another physical exam and diagnosed cervical spine strain and bilateral wrist strain. Physical therapy was recommended for the spine and wrists. Claimant was also given anti-inflammatory

⁷ R.H. Trans. at 25-26.

⁸ *Id.* at 11-12.

⁹ *Id.* at 17.

¹⁰ *Id.* at 38-39.

¹¹ *Id.* at 17-18.

¹² Estivo Depo. at 6.

medication and told not to conduct any repetitive use of the hands or overhead work. A recheck was scheduled for early November.

On November 10, 2003, claimant was seen for another follow-up visit. Claimant was still having some cervical spine discomfort throughout his range of motion. Dr. Estivo's diagnosis at this point was cervical spine pain and bilateral wrist pain. Dr. Estivo recommended an MRI of the cervical spine and requested that claimant not perform any repetitive use activities with both hands, or conduct any overhead work.¹³ The results of the MRI showed mild bulging of the C5-C6 disc favoring the left side, but no nerve root impingement. Dr. Estivo indicated that this could be the result of degenerative changes as well as injury.¹⁴

On November 21, 2003, Dr. Estivo examined claimant yet again and diagnosed cervical spine strain and mild bilateral wrist strain. He felt claimant was at MMI and released him with a 5 percent whole person impairment of the cervical spine.¹⁵ At this time Dr. Estivo did not feel that claimant was in need of restrictions and therefore lifted the previous ones. When asked, he testified that claimant suffered no task loss based upon a task analysis performed by Dan Zumalt, although he made it clear that this was only in relation to claimant's neck and upper extremity condition, as that was the only condition he was treating. Any restrictions for claimant's back were a separate issue and something he knew nothing about.¹⁶ In short, Dr. Estivo concluded claimant had recovered and is capable of repetitive work again.

Dr. Pedro A. Murati saw claimant on January 8, 2004 at the request of claimant's attorney. Dr. Murati noted claimant was complaining of pain in both wrists, hands and fingers, and pain in both forearms and neck pain, all of which he attributed to claimant's use of wrenches, hammers, deburring tools and knives over a period of time.¹⁷ Results of a September 4, 2003 NCS/EMG conducted by Dr. Olmstead, revealed borderline prolonged left ulnar sensory latency consistent with mild compression at the level of the wrist.

After an examination and review, Dr. Murati diagnosed carpal tunnel syndrome bilaterally, Guyon's canal entrapment on the left and cervical spine.¹⁸ Dr. Murati believed claimant's injuries were the direct result of a work-related injury that occurred each and

¹³ *Id.*, Ex. 2 at 3.

¹⁴ *Id.* at 13.

¹⁵ *Id.*, Ex. 2 at 1.

¹⁶ *Id.* at 22-23.

¹⁷ Murati Depo., Ex. 2 at 1.

¹⁸ *Id.*, Ex. 2 at 2.

every working day through the last day worked on August 26, 2003 during claimant's employment with Cessna.¹⁹ Effective January 8, 2004, claimant was assigned the following permanent restrictions of no heavy grasping over 40 pounds, no lifting, carrying, pushing, pulling over 35 pounds, occasional repetitive grasping and grabbing, occasional lifting, carrying, pushing, pulling 35 pounds, frequent repetitive hand controls, and frequent lifting, carrying, pushing, pulling 20 pounds. Claimant was to avoid awkward positions of the neck.

Using the fourth edition of the *AMA Guides*,²⁰ Dr. Murati assigned claimant a 10 percent impairment to the right upper extremity for right carpal tunnel syndrome, which converts to 6 percent whole person, 10 percent impairment to the left upper extremity for left carpal tunnel syndrome, and 10 percent impairment to the left upper extremity for the Guyon's canal entrapment on the left. Using the Combined Values Chart on page 322, these upper extremity impairments combine for 19 percent left upper extremity impairment, which converts to an 11 percent whole person impairment. Claimant was given a 5 percent whole person impairment for cervical sprain as it falls into the DRE Cervical Category II. These impairments combine for a 20 percent whole person impairment.²¹

Based upon the task loss analysis offered by Jerry Hardin, Dr. Murati further opined that claimant sustained a 49 percent task loss.

Dan Zumalt testified that claimant has the ability to earn \$20.81 per hour with benefits, which when calculated, yields a 9 percent wage loss. According to Mr. Zumalt, claimant is qualified to perform work as an inspector, testor, sorter sampler and weigher although there is no evidence that he has any experience performing any of these particular jobs or that any such jobs were available. In stark contrast, is the testimony of Jerry Hardin, who suggested claimant is capable of earning \$320 per week.

The ALJ concluded claimant met with personal injury by accident, arising out of and in the course of his employment in a series of accidental injuries, culminating on August 25, 2003.²² She reasoned "[c]laimant's testimony, plus the medical testimony, is persuasive that [c]laimant developed a cervical strain and injuries to his upper extremities, as the result of the physical demands of his job which involved repetitive use of wrenches and deburring equipment as well as stooping and leaning into the machines while using

¹⁹ *Id.* at 8.

²⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

²¹ Murati Depo., Ex. 2 at 3.

²² ALJ Award (Dec. 2, 2004) at 3.

the wrenches and equipment.”²³ The Board agrees with this finding and affirms the ALJ’s conclusion.

Like the ALJ, the Board is unpersuaded by respondent’s suggestion that claimant’s motivation for this claim is to retaliate against respondent because it refused to allow him to continue to work rather than a genuine assertion of a work-related injury. It is uncontroverted that claimant’s job was repetitive in nature. Claimant noticed the gradual onset of his symptoms as far back as 2002. Two physicians have opined that claimant suffered permanent impairment as a result of his work activities. Nonetheless, he continued to work at his normal job duties up to his last date of work. It is not surprising under these facts and circumstances that once claimant was the subject of respondent’s compulsory functional capacities evaluation²⁴, and escorted from respondent’s premises, that he would decide to assert this claim. Respondent took away his accommodated job, a job that he had been doing without complaint for a significant period of time, ostensibly because of a prior injury. At that point, claimant lost his incentive to forego his rights and continue to work.

The ALJ went on to conclude that claimant was entitled to 62 percent permanent partial general disability under K.S.A. 44-510e(a)(work disability). Work disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.²⁵ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute)

²³ *Id.*

²⁴ It is curious that the employer would, in 2003, decide to compel claimant to undergo an FCE for his 1994 low back injury. Claimant was performing his job, without complaint and apparently to respondent’s satisfaction.

²⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

In this instance, the ALJ averaged the two task loss opinions offered by Drs. Estivo and Murati, which yields 24 percent, along with a 100 percent wage loss. In doing so, she expressly concluded claimant demonstrated a good faith effort to find appropriate employment. Thus, she utilized his actual wage loss for purposes of the work disability computation.

In making this determination, the ALJ rejected respondent's assertion that claimant's purported work disability is the result of his 1994 low back injury and not because of the present neck and upper extremity claim. The ALJ likewise rejected Dr. Estivo's opinion that even though claimant had a permanent injury and 5 percent impairment from his repetitive work, he was not in need of work restriction.

The difficulty with respondent's argument is that it ignores the fact that there is other persuasive medical evidence which supports claimant's contention that he was unable to continue working at his repetitive duties with his neck and upper extremity complaints. While it is true that claimant had returned to work at a comparable wage following his 1994 injury, thus avoiding any work disability award stemming from that accident, he went on to sustain an injury to his neck and upper extremities while performing his duties as a CNC/lathe operator. Respondent's counsel's suggestion (at oral argument) that it's decision to conduct an FCE and thereafter place claimant on medical leave *for his earlier low back injury* negates any claim for work disability in this docketed claim is, under these facts, unpersuasive.

Based upon the evidence contained within the record the Board agrees and affirms the ALJ's conclusions on the issue of work disability. While respondent may contend that its decision to place claimant on medical leave in connection with his 1994 low back claim prevents an award for work disability, the Board finds that decision nonetheless gives rise to the potential for work disability.²⁶ Claimant has proven new injuries and the need for additional restrictions which place him at a competitive disadvantage in the open labor market.

Claimant's list of employment contacts is extensive, focused and reveals an average of 5 contacts per week. While it is true that many of claimant's efforts reveal the

²⁶ See generally *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

prospective employers were not actively hiring, there is no indication that he was purposefully sabotaging his job search, or was engaged in a less than sincere effort to find appropriate employment. Accordingly, the Board affirms the ALJ's decision to base claimant's work disability upon a 100 percent wage loss and a 24 percent task loss, leaving claimant with a 62 percent work disability.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated December 2, 2004, is modified to reflect a date of accident of August 26, 2003 and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Vince A. Burnett, Attorney for Self-Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director